

Sustainable Development Law & Policy

Volume 6

Issue 3 *Spring 2006: Sound Chemicals Management*

Article 7

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Recommended Citation

Moshman, Rachael and John Hardenbergh. "The Color of Katrina: A Proposal to Allow Disparate Impact Environmental Claims." *Sustainable Development Law & Policy*, Spring 2006, 15-16, 73.

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THE COLOR OF KATRINA: A PROPOSAL TO ALLOW DISPARATE IMPACT ENVIRONMENTAL CLAIMS

by Rachael Moshman and John Hardenbergh*

As the floodwaters slowly receded from Hurricane Katrina in New Orleans and the Gulf Coast, the landscape revealed not only demolished neighborhoods but also the government's discrimination against the region's poor Black and Latino communities. Covering this landscape was a brown, filmy sediment left behind by Katrina's polluted floodwaters, which the U.S. Environmental Protection Agency's ("EPA") early tests showed had high levels of *E. coli* bacteria, oil and gas chemicals, lead, and varying quantities of arsenic.¹ Other tests also found benzo(a)pyrene and petroleum hydrocarbons at levels above the EPA's safe limit standards.² Coastal towns became contaminated when the hurricane lifted up bayou sludge, polluted for decades by industrial chemicals, heavy metals, and organic petrochemicals.³

Several months later, Louisiana State's chief environmental officer stated that the floodwaters, and what they left behind, did not contain chemical contaminants capable of causing harm.⁴ Local doctors, however, reported widespread coughs, sore throats, runny noses, and respiratory trouble – dubbed the "Katrina Cough" – amongst people returning to New Orleans and other post-hurricane flooded areas.⁵

Hurricane Katrina proves that federal and state governments continue to engage in racist neglect.

U.S. government stop denying the risks of exposure and commit to a thorough clean-up.⁶

COMMUNITIES AT RISK

Poor people and people of color in Louisiana are already more vulnerable to toxic chemical contamination.⁷ The U.S. Department of Agriculture ("USDA") defines 24 of 64 parishes in Louisiana as "persistent poverty parishes" and "32 as black high poverty parishes."⁸ Some of these communities are found in the 70 miles between Baton Rouge and New Orleans called "Cancer Alley" because of the 93 oil refineries and chemical plants that emit toxins into the air and water.⁹ A special report from the Times-Picayune in 2000 stated that minorities and the poor "bear more environmental burdens . . . than the rest of the population."¹⁰

For example, in 1999, the U.S. government highlighted the alarmingly high rate of organic pollutants found in the citizens of Mossville, Louisiana, a black community surrounded by over 30 petrochemical and industrial plants within a two-mile radius.¹¹ In

an environment where communities are already over-exposed to environmental pollutants, the disproportionate impact of Katrina's environmental consequences are predictable. Speaking on the health impact of Hurricane Katrina on poor and African American populations, former U.S. Surgeon General David Satcher said, "the same things that lead to disparities in health in this country on a day-to-day basis led to the disparities in the impact of Hurricane Katrina."¹²

If the U.S. government continues to pretend that post-Katrina communities are safe to return to when they are truly not, it will continue contributing to the long history of governmental decision-making that disproportionately places environmental burdens on poor communities and communities of color. This pattern was first reported in 1983 when the General Accounting Office ("GAO") examined the racial and economic composition of the communities surrounding four of the largest hazardous waste landfills and discovered that all were located in majority black counties.¹³ Four years later, the United Church of Christ studied the demographic make-up of 415 zip code areas that were known to contain haz-



One month after Katrina hits, still-soft silt covers the 9th Ward.

Environmentalists continue to caution returnees of the potential exposure to hazardous chemicals and assert that the EPA has not used stringent enough standards to establish the sediment's threats. At the same time, environmentalists demand that the

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ardous waste facilities, and found that race was the most significant variable associated with the placement of these facilities.¹⁴ A 1994 update of the study found that the concentration of people of color in these localities has only increased in the interim.¹⁵

INCREASINGLY NARROWING RIGHTS OF ACTION

Courts have unfortunately foreclosed the possibility of using traditional civil rights remedies to address proven discriminatory effects in environmental policy. They have done so by narrowing the grounds on which plaintiffs can sue, and by requiring them to prove discriminatory intent in these policies.¹⁶ However, evidence that governmental decision makers discriminated on the basis of racial animus is generally very difficult for plaintiffs to produce.¹⁷ Government officials motivated by racism are unlikely to memorialize this intention in a discoverable form in today's world. Furthermore, it matters little to individuals subjected to such discriminatory effects whether the decision maker intended this discrimination or not. In the weeks following Katrina, media reports highlighted the obvious role that race played in the impact of the hurricanes. This consensus on the racial elements of this environmental disaster should be used to create momentum for legislative action against environmental racism. Hurricane Katrina proves that federal and state governments continue to engage in racist neglect. More importantly, the federal courts' narrowing of the rights available under civil rights laws highlight the need for Congress to create a private right of action to allow individuals to file suit against the government for disparate environmental impacts.

DISPARATE IMPACT: A NEW PRIVATE RIGHT OF ACTION

Appropriate legislation enabling the creation of a private right of action for environmental discrimination would include several key threshold elements: first, that a plaintiff prove that a government environmental enforcement action had a disparate negative impact on a racial minority or low-income community as to be defined by the Department of Labor; and second, that he or she is a member of such a racial minority or low-income community. Expanding the class protected to include low-income communities would eliminate the need for courts to untangle the intimately related causes of race and economic class. Although this proposed legislation would be the first civil rights law prohibiting discrimination based on economic class, this principle is relatively uncontroversial in most countries in the world and is reflected in the United States' commitments under international human rights law as

embodied in the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights.¹⁸

Once the plaintiff meets these two threshold requirements, the burden would shift to the defendant to prove that the decision was justified by environmental necessity or other compelling governmental interest. Proof that a decision disproportionately burdening a racial minority or low-income community is economically efficient would not meet the defendant's burden. To permit otherwise would render the proposed provisions prohibiting class-based environmental discrimination completely ineffective.

CONCLUSION

Years from now, Americans may look back on Hurricane Katrina as the event that catalyzed concrete action addressing the disparities in race and class continuing four decades after the passage of the Civil Rights Act of 1964. Katrina provides the opportunity to make environmental justice the next step in the civil rights movement.



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ENDNOTES:

¹ NATIONAL GEOGRAPHIC NEWS, *Gulf Wracked by Katrina's Latest Legacy – Diseases, Poisons, Mold* (Sept. 30, 2005), available at http://news.national-geographic.com/news/2005/09/0930_050930_katrina_health.html (last visited Mar. 8, 2006) [hereinafter NATIONAL GEOGRAPHIC NEWS].

² Press Release, Subra Company and Louisiana Environmental Action Network, Results of Sediment and Water Sampling in Residential Areas Impacted by Hurricane Katrina (Oct. 7, 2005).

³ See NATIONAL GEOGRAPHIC NEWS, *supra* note 1.

⁴ REUTERS, *Government Says New Orleans Environmentally Safe* (Dec. 9, 2005), available at <http://www.alertnet.org/thenews/newsdesk/N09175559.htm> (last visited Mar. 8, 2006).

⁵ See SLATE.COM, *Katrina Cough: The Health Problems of 9/11 are Back* (Nov. 15, 2005), available at <http://www.slate.com/id/2130421> (last visited Mar. 8, 2006).

⁶ *Activists Weigh Litigation as EPA Downplays Risks from Hurricane*, Inside the EPA, Sec.50, Dec. 16, 2005, available at http://epa.iwpnewsstand.com/epanewsstand_spclssubj.asp?s=katrina (last visited Mar. 8, 2006).

⁷ See e.g., John McQuaid, *Too Close for Comfort*, THE TIMES-PICAYUNE, May 21, 2000 at J2, available at <http://www.nola.com/specced/unwelcome/index.ssf?/specced/unwelcome/stories/0521close.html> (last visited Mar. 8, 2006) (“In this landscape of belching flares, Superfund sites and rail cars filled with hazardous chemicals, poor African-Americans bear the lion’s share of the environmental hazards and burdens.”).

⁸ LSU AGCENTER, LOUISIANA’S RURAL POVERTY (Sep. 2005), available at <http://www.lsuagcenter.com/NR/rdonlyres/68AE9B71-F810-4741-A53F-CE2E5AEF36DF/16549/Poverty.pdf> (last visited Mar. 8, 2006).

⁹ See Conger Beasley, Jr., *Of Pollution and Poverty: Part 2: Keeping Watch in Cancer Alley*, 2 BUZZWORM: THE ENVTL. J. 38, 39 (1990).

¹⁰ McQuaid, *supra* note 7.

¹¹ WORLD COUNCIL OF CHURCHES, *Environmental Racism: Old Wine in a New Bottle* (2000), available at <http://www.wcc-coe.org/wcc/what/jpc/echoes/echoes-17-02.html> (last visited Mar. 8, 2006).

¹² January W. Payne, *At Risk Before the Storm Struck*, WASH. POST, Sept. 13, 2005 at HE01.

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¹³ Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities, General Acct. Off., GAO/RCED-83-168, (1983).

¹⁴ Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, United Church of Christ Comm'n for Racial Justice (1987).

¹⁵ See e.g. Julie H. Hurwitz and E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism*, 2 J. L. Soc'Y 5, 12-13 (2001).

¹⁶ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (finding that suits brought under the Equal Protection Clause of the 14th Amendment require showing of intent); *Regents of Univ. of Cal v. Bakke*, 438 U.S. 265 (1978) (finding that Title VI of the Civil Rights Act of 1964 only prohibits discriminatory intent); *Alexander v.*

Sandoval, 532 U.S. 275 (2001) (holding agency regulations interpreting Title VI to prohibit programs that give rise to mere discriminatory effects are not enforceable by a private right of action); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (announcing new test that appears to eliminate the possibility that plaintiffs could use 42 U.S.C.A § 1983 to enforce these disparate impact regulations).

¹⁷ Some commentators have noted the irony that the plaintiffs that are most likely to have evidence proving intentional discrimination are white people who wish to challenge affirmative action programs, see Note *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1780 n.37 (2003).

¹⁸ Universal Declaration of Human Rights, G.A. Res. 217A, Art. 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, Arts. 2(1) and 26, 999 U.N.T.S. 171, (*entered into force* Mar. 23, 1976).